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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.U., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ERIC U.,

Defendant and Appellant.

F071963

(Super. Ct. No. 15CEJ300041)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Mary Dolas,
Judge.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, and David F. Rodriguez, Deputy County
Counsel, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Eric U. (father) appeals from the juvenile court's disposition order denying reunification services pursuant to Welfare and Institutions Code¹ section 361.5, subdivision (b)(13), with his daughter, M.U. We will affirm.

FACTUAL AND PROCEDURAL SUMMARY

The Fresno County Department of Social Services (the Department) filed a juvenile dependency petition on behalf of M.U. on February 13, 2015. The petition alleged inter alia that M.U. fell within the provisions of section 300, subdivision (b), because of substance abuse by both her parents. An amended section 300 petition was filed on February 17, 2015, which included all the allegations of the original petition and added allegations that M.U. was at risk because of domestic violence in the home.

In the detention report, the Department advised that it had received a referral that M.U. was living with her mother in an unsafe home. There were exposed electrical wires in reach of M.U.; power strips were connected together and ran from the home to main house; and drugs and drug paraphernalia were in the home. An open septic tank was behind the home. The bedroom was filled with methamphetamine smoke and a cigarette box, filled with marijuana and prescription pills, was in reach of M.U. A protective hold was placed on M.U.

Mother stated that she and M.U. had been living in the home for about one and one-half months. Father had been living with them until about a week prior, when he was in a confrontation with one of the roommates who also was living in the house. Father was placed on a section 5150 hold.

At the February 18, 2015, detention hearing, the juvenile court ordered M.U. detained from both parents and found Eric to be the presumed father of M.U. The juvenile court ordered that the Department provide parenting, substance abuse, mental

¹ All further statutory references are to the Welfare and Institutions Code.

health, and domestic violence assessment and services to both mother and father. Father did not meet with the social worker after the detention hearing, as he was arrested and incarcerated.

The jurisdiction report noted that there was an active restraining order between mother and father because of a history of domestic violence, however, they continued to remain in a relationship. The domestic violence included physical and verbal altercations in front of M.U. The jurisdiction report also noted that father had substance abuse issues, including the use of methamphetamine and marijuana. Father had tested positive for marijuana on February 13, 2015.

The report asked that the allegations of the amended petition be found true and M.U. be declared a dependent of the juvenile court pursuant to section 300, subdivision (b).

Father signed a waiver of rights and submitted on the jurisdiction report at the continued jurisdictional hearing on March 24, 2015. The juvenile court found that father was not contesting the evidence presented by the Department. The juvenile court made true findings on all of the allegations of the amended petition. The disposition hearing was scheduled for April 21, 2015.

The disposition report recommended that reunification services be denied father pursuant to section 361.5, subdivision (b)(13). Father's probation report dated November 14, 2014, noted that father had been referred to an outpatient treatment program for substance abuse and had completed the program. The disposition report stated that father told the social worker on March 23, 2015, that he had a substance abuse problem with methamphetamine and marijuana. Father also told the social worker he would benefit from a substance abuse treatment program.

Father had two criminal convictions involving drugs in 2010; one for possession of a controlled substance and one for possession of paraphernalia. He was ordered into a

substance abuse treatment program, but did not complete the treatment. Father was ordered into a treatment program again in 2014 by the probation department. He reported completing this program, but provided no proof of completion.

The disposition report noted that father's substance abuse was a factor in the domestic violence in the home; father had failed to achieve and maintain sobriety over the past several years, despite being ordered into substance abuse treatment programs on at least two occasions; the home where M.U. was found had drugs and drug paraphernalia within reach of M.U.; and father had told the social workers he cannot provide a safe home for M.U.

The disposition report opined that reunification was not in the best interests of M.U. M.U. was at that time 10 months old and had no significant bond with father. Father had untreated mental health issues, domestic violence behaviors, and substance abuse issues, and was unable to fulfill the role of a stable and sober care provider for M.U.

Father was still in custody as a result of a February 2015 domestic violence conviction. Father was hoping for an early release and entry into a residential treatment program for substance abuse.

As for mother, the disposition report recommended reunification services be provided. M.U. remained in her aunt's care, however, mother was harassing the aunt via phone calls and text messages.

The contested disposition hearing commenced on June 2, 2015. The Department submitted on the various reports that had been filed, as did mother. The Department also reserved the right to present rebuttal witnesses and evidence. Father's counsel called the social worker to testify and questioned her about the contents of the disposition report.

At the conclusion of the contested disposition hearing on June 4, 2015, the juvenile court ordered that reunification services be provided to mother, but denied to

father pursuant to section 361.5, subdivision (b)(13). Father timely appealed on July 15, 2015.

DISCUSSION

Eric contends the juvenile court erred in denying him reunification services because the Department did not prove by clear and convincing evidence that he fell within the provisions of section 361.5, subdivision (b)(13). He also contends reunification with him was in M.U.'s best interests. We reject both contentions.

I. Standard of Review

A denial of reunification services pursuant to section 361.5, subdivision (b) is reviewed under the substantial evidence test. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.) The appellate court reviews the whole record in the light most favorable to the juvenile court's order and determines whether there is any substantial evidence that supports the order, resolving all conflicts in support of the order and indulging all legitimate inferences to uphold the ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) We defer to the juvenile court on issues of credibility of witnesses and evidence. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) If there is substantial evidence to support the order, the appellate court must uphold the order even if evidence could support a contrary holding. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

The juvenile court's ruling is presumed correct and the burden is on Eric to overcome this presumption by affirmatively establishing error. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

II. Section 361.5, subdivision (b)(13)

The provisions of section 361.5, subdivision (b) constitute circumstances in which the Legislature recognized "it may be fruitless to provide reunification services." (*In re Rebecca H.* (1991) 227 Cal.App.3d 825, 837.) "Once it is determined [that section

361.5,] subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.’” (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.)

Section 361.5, subdivision (b)(13) provides in relevant part that reunification services may be denied to a parent who “has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition” Where a parent has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted treatment for this problem during the three years immediately prior to the filing of the petition, using scarce resources to continue to address the substance abuse problem would be “an enormous expense and drain on a dependency system, which is already strained to the breaking point.” (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016, fn. 3.)

Here, Eric focuses on the comment in the Department’s disposition report noting that Eric reported participating in substance abuse treatment after his 2010 drug conviction, but failed to provide “proof” of his participation. We accept Eric’s statement as true, that he satisfactorily completed a substance abuse treatment program. This, however, does not help his case. It affirms that he has received substance abuse treatment, yet continues to resist that treatment by continuing to abuse illegal substances.

Eric acknowledged his continuing substance abuse problem at the detention hearing. Failing to benefit from substance abuse treatment constitutes resistance to prior treatment and is grounds for denying reunification services. (*Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1009-1010.) As the court in *Karen S.* stated:

“[A] parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol, thus demonstrating an inability to use the skills and behaviors taught in the program to maintain a sober life. In

either case, a parent has demonstrated a resistance to eliminating the chronic use of drugs or alcohol which led to the need for juvenile court intervention to protect the parent's child." (*Id.* at p. 1010.)

Furthermore, the appellate court in *Laura B. v. Superior Court* (1998) 68 Cal.App.4th 776, stated that a social service agency is required only to prove "that a parent has previously undergone or enrolled in substance abuse rehabilitation. Then, during the three years prior to the petition being filed, the parent evidenced behavior that demonstrated resistance to that rehabilitation. Such proof may come in the form of dropping out of programs, but it may also come in the form of resumption of regular drug use after a period of sobriety." (*Id.* at p. 780.) The Department, in order to satisfy section 361.5, subdivision (b)(13), was required to show resistance by Eric to the substance abuse treatment during the three years prior to the filing of the petition, not that he participated in substance abuse treatment during that three year period. (*Laura B., supra*, at pp. 778-779.)

The juvenile court had before it an abundance of evidence demonstrating resistance to substance abuse treatment in the three years prior to the filing of the petition. The original petition was filed on February 13, 2015. The record shows that on January 19, 2011, Eric suffered two drug-related convictions. On January 19, 2011, he entered into a deferred entry of judgment pursuant to Penal Code section 1000, whereby he agreed to enroll and participate in a drug treatment program and to not consume or possess any illegal drugs, and was placed on probation.

In 2014, Eric was found to have failed to comply with the terms of his deferred entry of judgment and probation, in that he continued to use illegal narcotics.

On November 14, 2014, Eric was convicted of a domestic violence offense and placed on probation. As a condition of probation, he was ordered to enroll in and complete a drug and alcohol treatment program. Eric violated probation by failing to complete a drug treatment program and testing positive for an illegal substance,

marijuana, on February 13, 2015. He was incarcerated for the violation. Approximately one week before the disposition hearing, Eric was released from custody and into a drug treatment program.

In the three years prior to the filing of the petition, the record shows that Eric resisted treatment for his substance abuse problem by continuing to use illegal substances, after having participated in a treatment program and despite being ordered by the superior court multiple times to refrain from drug use. (*Laura B. v. Superior Court*, *supra*, 68 Cal.App.4th at p. 780.) Consequently, ample evidence supported the juvenile court's finding that section 361.5, subdivision (b)(13) applied to Eric.

III. Section 361.5, subdivision (c)

Eric also contends that the juvenile court abused its discretion when it found that reunification was not in M.U.'s best interests, pursuant to section 361.5, subdivision (c). Again, we disagree.

As Eric notes, when section 361.5, subdivision (b)(13) applies, the juvenile court must nevertheless order reunification services for the parent if it finds by clear and convincing evidence that reunification is in the best interests of the child. (§ 361.5, subd. (c).)

In determining whether to order reunification services despite the applicability of section 361.5, subdivision (b), the juvenile court should assess the gravity of the problem; the strength of the child's bond with the parent; and the need of the child for stability and permanence. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 66-67.) The party seeking to invoke section 361.5, subdivision (c) has the burden of proving by clear and convincing evidence that reunification is in the best interests of the child. (*Marshall M. v. Superior Court* (1999) 75 Cal.App.4th 48, 59.) The disposition report addressed each of these factors and opined that reunification with Eric was not in M.U.'s best interests.

Here, Eric has a significant substance abuse problem which he was unwilling to conquer. He was ordered into substance abuse treatment in 2011. Yet, he still was abusing illegal substances four years later. Eric's substance abuse was a factor in the domestic violence in the home and there was a restraining order in effect as a result of the violence in the home.

At the time of the disposition hearing, M.U. was 10 months old. The social worker noted that Eric "has been able to maintain a relationship with his child" and the "relationship with her father ... cannot be absolutely denied." The social worker also noted, however, that during the supervised visits Eric had with his daughter, M.U. "did not demonstrate that she was excited or happy to see" Eric. M.U. "looked at him when he got her attention, but there were few signs of positive recognition or pleasure in seeing him."

As for being able to provide permanence and stability for M.U., the record demonstrated Eric's inability or unwillingness to do so. He was in and out of custody as a result of convictions and violations of probation, due to his substance abuse and domestic violence. The Department described Eric's chances at successfully reunifying as "very poor." The juvenile court found that Eric's progress toward alleviating the causes that prompted the filing of the dependency petition were minimal.

As of the date of the disposition report, M.U. had "made great strides while in [care provider's care]" in a home that was stable, with sober and attentive adults.

Moreover, the fact that M.U.'s mother was to receive reunification services does not support a finding that reunification with Eric would benefit M.U. and Eric has failed to cite any authority for this position. M.U.'s mother had an active restraining order against Eric as a result of the domestic violence.

Eric failed to produce evidence necessary to establish that reunification with M.U. would be in her best interests. Therefore, the juvenile court did not abuse its discretion in

not making a finding in Eric's favor under section 361.5, subdivision (c). (*Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73-74.)

DISPOSITION

The juvenile court's disposition order is affirmed.

LEVY, Acting P.J.

WE CONCUR:

KANE, J.

FRANSON, J.